also placed a small amount of weight on Lopez's degree of attention but found his testimony had been undermined during cross-examination. App., *infra*, 17a-18a.)

On appeal, citing empirical evidence about misidentifications, petitioner challenged the continuing validity of the certainty factor. At oral argument, however, the Second Circuit panel explained that, regardless of troubling developments in the empirical research, it had no authority to overrule *Biggers* and its progeny. The court's decision rejected petitioner's claims regarding the reliability of the identification, stating that, "[b]ased on the district court's analysis in accordance with the five-part reliability test, see *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), we conclude that there was no clear error." App., *infra*, 10a.

## REASONS FOR GRANTING THE PETITION

In *Neil* v. *Biggers*, 409 U.S. 188 (1972), this Court announced a five-factor test for determining the reliability of eyewitness identifications. The *Biggers* test was reaffirmed in *Manson* v. *Braithwaite*, 432 U.S. 98 (1977), and remains the law of the land today. But empirical research conducted in the decades since *Biggers* and *Manson* establishes beyond reasonable dispute that the test does not do what it is supposed to do. In particular, at least one of the *Biggers* factors—the certainty with which a witness makes an identification—has been conclusively shown to have little or no correlation with the accuracy of that identification.

These advances in knowledge render the continued application of *Biggers* untenable. And indeed, state courts of last resort are increasingly abandoning the *Biggers* test in favor of more supportable measures of reliability, or going even further and holding that identifications based on suggestive procedures are *per se* inadmissible. See Part II, *infra*. But the federal courts are bound by *Biggers*, and must continue to apply its fundamentally flawed five-factor test until this Court tells them otherwise.

This issue is of great significance—the lower federal courts are asked to assess the reliability and admissibility of eyewitness testimony virtually every day. And only this Court can fix the problem, as *Biggers* and *Manson* are constitutional decisions and thus cannot be abrogated by Congress. Nor is there any reason to delay consideration of the question presented: because lower courts are bound to follow *Biggers*, no circuit split will ever arise. In light of thirty years of empirical research demonstrating that the "certainty" factor is far more likely to be misleading than to be helpful in determining the reliability of eyewitness evidence, the time has come for this Court to reconsider *Biggers*.

## I. Review Should Be Granted Because Scientific Evidence Has Undermined The Empirical Basis For This Court's Holding In *Biggers* That Courts Should Consider An Eyewitness's "Level Of Certainty Demonstrated At The Confrontation" When Deciding Whether To Admit Evidence Derived From Unnecessarily Suggestive Identification Procedures.

### A. The certainty factor established in *Biggers* is an improper means to ensure that evidence from a suggestive eyewitness identification is sufficiently reliable to satisfy the requirements of due process.

"[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114; see also *Foster* v. *California*, 394 U.S. 440, 443 (1969); *Stoval* v. *Denno*, 388 U.S. 293, 301-02 (1967); *Wade*, 388 U.S. at 228. This Court's cases make clear that the "the primary evil to be avoided" by judicial scrutiny of eyewitness identifications is the "very substantial likelihood of misidentification." *Biggers*, 409 U.S. at 198.[2] If a defendant can

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[2] The standard adopted in *Biggers* for out-of-court identifications is an adaptation of the standard the Court used in *Simmons* v. *United States*, 390 U.S. 377, 384 (1968), for in-court identifica-

show that "the confrontation conducted * * * was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law," the identification evidence is not admissible. *Stoval*, 388 U.S. at 301-302.

The overwhelming scientific consensus now shows that the inclusion of a witness's certainty in the list of factors to be considered cannot be squared with the Court's emphasis on avoiding misidentifications. This is so because the degree of certainty exhibited by a witness has very little correlation with the witness's accuracy, and because a witness's certainty can easily be manipulated and affected by irrelevant factors.[3] For example, one review of the relevant literature

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tions. See *Biggers*, 409 U.S. at 198 ("It is, first of all, apparent that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.")

[3] The degree of witness certainty is not the only *Biggers* factor called into question by current scientific consensus. Research has also found that the third *Biggers* factor, the "accuracy of [the witness's] prior description" of the suspect, has an insignificant correlation to the accuracy of the identification. Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 845 & n.214 (1994) (citing Melissa Pigott & John C. Brigham, *The Relationship Between the Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCHOL. 547 (1985); Alvin G. Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?* 13 BULL. PSYCHONOMIC SOC'Y 15 (1979); Brian L. Cutler et al., *The Reliability of Eyewitness Identification*, 11 L. & HUM. BEHAV. 233, 253-54 (1987) (showing a negative correlation between memory for peripheral details surrounding the event and the accuracy of the identification); Gary L. Wells & Michael R.

found it "safe to conclude from existing research that under the conditions that typically prevail in short criminal encounters between victims-witnesses and perpetrators, witness * * * confidence in having made a correct identification is, at best, only modestly associated with identification accuracy." Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCH., PUB. POL., & LAW 817, 825 (1995).

Various studies over many years have confirmed the weak correlation between confidence and accuracy. See, *e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, 285-290 (2003) (reviewing major developments in the experimental literature relating to the accuracy of eyewitness identifications) [hereinafter "*Eyewitness Testimony*"], *available at* http://www.psychology.iastate.edu/faculty/gwells/annual_review_2003.pdf. In fact, the consensus that witness confidence is a very poor predictor of accuracy is strong: one recent survey found that 73% of eyewitness experts would be willing to testify that "confidence is not a good predictor of identification accuracy." Neil Brewer, Amber Keast, & Amanda Rishworth, *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL PSYCHOL. 44 (2002).

Although some studies have found a statistically significant correlation between witness certainty and accuracy, these studies have found such a relationship only by controlling factors that it is impossible or wholly infeasible to control in the real world. See, *e.g.*, Siegfried Ludwig Sporer,

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Lieppe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can be Misleading*, 66 J. APPLIED PSYCHOL. 682, 685 (1981) (showing that jurors give more credibility to an identification where the witness provides a more detailed description)).

Don Read, Steven Penrod & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULLETIN 315 (1995). Thus, although Sporer's meta-analysis produced a certainty-accuracy correlation, it did so only by considering those subjects who make a "choice" by making an identification, and excluding those subjects who made no choice by making correct and false rejections. *Id.* at 316-317. But in the real world, law enforcement cannot control for these factors to determine whether a particular witness is more or less reliable. See Kenneth Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about their Relationship*, 4 L. & HUM. BEHAV. 243, 258 (1980) (reporting that a meta-analysis of twenty-five studies on the relationship between certainty and accuracy shows some degree of correlation under optimal witnessing conditions, but concluding that witness certainty should not be relied upon because such factors cannot be easily ascertained in the real world).

Moreover, research has shown that the certainty of a witness is easily manipulated by a variety of factors that have nothing to do with accuracy. See, *e.g.*, Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998) [hereinafter "*Good, You Identified the Suspect*"].

For example, in one study, researchers gave some subjects confirming feedback after they made misidentifcations but gave other subjects no feedback. See *Good, You Identified the Suspect*, at 363. Those subjects who received confirming feedback reported greater certainty in their identification—even though it was wrong—than those sub-

jects who received no feedback. *Ibid.*; see also *Eyewitness Testimony*, at 283 ("In actual cases, it is common for lineup administrators * * * to give confirming feedback to eyewitnesses, thereby inflating the certainty of the eyewitness and confounding the certainty-accuracy relation.").

Similarly, some researchers have noted that "confidence statements from eyewitnesses can be affected dramatically by events occurring after the identification (post-identification events) that have nothing to do with the witness's memory." Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 635, (1998) [hereinafter "*Recommendations for Lineups and Photospreads*"], *available at* www.psychology.iastate.edu/faculty/gwells/whitepaperpdf.pdf. Thus, these scientists have recommended that if certainty is to be included as a factor at all, it should be the witness's certainty immediately after the actual identification (and without any influence by the lineup or array administrator). See *ibid.*; see also Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 HUM. LAW & BEHAV. 581, 592 (2000).

At the same time, research shows that fact-finders place a disproportionate weight on the confidence of the witness in their reliability analysis. One study reported that "[t]here is converging evidence from various streams of research that demonstrates that both professionals and lay people (jurors) put particular faith in the confidence a witness displays when making a lineup decision." Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22, 23 (1993). See also Penrod & Cutler, *Witness Confidence*, *supra*, at 819 (reporting a mock-jury study finding that "nearly four out of five mistaken identifications are believed"); Gary L. Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony*, *in* EYEWITNESS TESTI-

MONY: PSYCHOLOGICAL PERSPECTIVES, 256, 271 (Gary L. Wells, Elizabeth F. Loftus, eds., 1984) ("[T]here is at least one important aspect of eyewitness testimony that is misunderstood by the trier of fact, namely eyewitness confidence"). Another study explained that "[j]urors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses—because they rely so heavily on witness confidence, which is relatively nondiagnostic—and are generally insensitive to other factors that influence identification accuracy."; *Recommendations for Lineups and Photospreads*, at 624.[4]

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[4] Scientific research has also shown that other factors not considered by the Court in *Biggers* or *Manson* are more strongly correlated with accuracy. See, *e.g.*, *Eyewitness Testimony*, at 286 (reporting that research has shown that "the ratio of accurate to inaccurate identifications is strongly affected by whether or not eyewitnesses have been instructed (warned) prior to the lineup that the culprit might or might not be in the lineup." (citing R.S. Malpass & P.G. Devine, *Eyewitness identification: lineup instructions and the absence of the offender*, 66 J. APPLIED PSYCHOL. 482, 482-489 (1981)). See also *State* v. *Ledbetter*, 881 A.2d 290, 317 (Conn. 2005) (holding that based on this body of research courts are required to instruct juries on the risk of misidentification that arises when police fail to warn eyewitnesses that a suspect may not be present at an identification procedure or indicate to a witness that a suspect is present).

A strong correlation has also been found between how quickly the witness makes an identification and the accuracy of the identification. See David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10 to 12 Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, 87 J. APPLIED PSYCHOL. 951, 958-960 (2002) (finding that witnesses who make their identification in less than 10-12 seconds were 90% accurate in their identifications in contrast to those who took longer were 50% correct); Sporer, *Eyewitness Identification Accuracy*, *supra*.

At this point there can be no serious dispute that *Biggers*' witness certainty factor is not relevant to the determination whether identification evidence produced from an unnecessarily suggestive procedure is reliable. A defendant's right to due process is jeopardized by a court's reliance on a legal test that fails to achieve its purpose, furthers the admission of unreliable evidence, and places the defendant at risk of being convicted by a misidentification. Only this Court can fix this problem that is daily presented in courts across the country.

**B. The use of the witness certainty factor raises serious due process concerns because the *Biggers* factors become relevant only after a court has found that an identification was produced from unnecessarily suggestive procedures and its reliability is highly in doubt.**

The *Biggers* factors, it must be recalled, assess the reliability of an identification that a court has already found was the product of unnecessarily suggestive identification procedures. In other words, the accuracy of the identification is already seriously in doubt before the *Biggers* factors are even applied. Even partial reliance on the certainty factor to determine the reliability of the identification therefore is highly problematic.

As this Court has explained, suggestive identification techniques such as those that were used in this case can be highly influential on a witness. See, *e.g.*, *Manson*, 432 U.S. at 111-112. Particularly relevant here is the concern the Court expressed in *Simmons* regarding the suggestiveness of photo arrays that are conducted in a fashion that results in a highly questionable identification:

> Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustwor-

> thiness of subsequent lineup or courtroom identification.

*Simmons*, 390 U.S. at 383-384.

The research literature corroborates the Court's concern about the dangers of misidentifications that result from suggestive procedures. Studies have repeatedly shown that the use of suggestive identification procedures is highly correlated with inaccurate identifications. See, *e.g.*, *Eyewitness Testimony*, at 285-290 (reviewing eyewitness identification literature discussing system variables that increase or decrease the likelihood of a false identification); see also *Recommendations for Lineups and Photospreads*, at 605 (evaluating 40 cases of defendants who were exonerated through DNA evidence finding that 90% of the cases relied on evidence of eyewitnesses that falsely identified the exonerated defendant).

A suggestive photo array, such as the one used in this case, presents an extra challenge because the defendant does not have the right to counsel at this stage in the prosecution. See *United States* v. *Ash*, 413 U.S. 300, 321 (1973) (holding that the Sixth Amendment does not "grant the right to counsel at photographic displays"). The district court found that "the use of Jose Antonio Perez's dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure that was unduly suggestive." App., *infra*, 14a. This type of suggestive procedure has been criticized for producing inaccurate identifications. Thus, one of the four proposed rules recently recommended by scientific experts for accurate lineups or photospreads is that "[t]he suspect should not stand out in the lineup or photospread as being different from the distractors based on the eyewitness's previous description of the culprit or based on other factors that would draw extra attention to the suspect." *Recommendations for Lineups and Photospreads*, at 630. As the authors of that study explain, instances in which the sus-

pect stands out from the distractors severely detract from our ability to trust an identification:

> Perhaps the suspect stands out because s/he is the only one who fits the verbal description that the eyewitness had given the police earlier, or because the suspect is the only one dressed in the type of clothes worn by the culprit, or because the suspect's photo was taken from a different angle than the other photos. The presence of features that make the suspect stand out from the distractors confounds our ability to conclude that the selection of the suspect was due to true recognition versus some form of suggestion, demand, or inference.

*Id.* at 24 (internal citations omitted).

In light of the evidence undermining the empirical foundations on which the *Biggers* test rests, this Court should grant certiorari to reconsider the *Biggers* factors.

## II. Review Should Be Granted Because A Series Of State Courts Of Last Resort Have Called Into Question The Continuing Validity Of The *Biggers* Factors And, Specifically, The Witness Certainty Factor.

Review in this case is warranted not only because the witness certainty factor applied in the federal courts is plainly unsupportable as a scientific matter, but also because that factor has been expressly rejected by a number of state courts of last resort.

In the years since this Court's decisions in *Biggers* and *Manson*, a series of state courts of last resort have concluded that, in light of the scientific evidence about the reliability of eyewitness identifications, application of the *Biggers* factors—and especially the witness-certainty factor—cannot adequately protect a defendant's due process rights. These courts have acted under their authority to interpret state constitutional provisions more strictly than the corresponding

provisions of the federal constitution, but their decisions do not rely on textual or structural differences between the state and federal constitutions. Rather, these courts have recognized that this Court's holding in *Biggers*, which was explicitly based on the Court's empirical analysis of the psychology of witness identification, is no longer tenable.

For example, in *State* v. *Long*, 721 P.2d 483 (Utah 1986), the Supreme Court of Utah held that trial courts must give cautionary instructions to the jury when the prosecution has presented evidence of a pre-trial eyewitness identification. The court recognized that "[t]here is no significant division of opinion" in the psychological literature on the unreliability of eyewitness identifications, but noted that juries routinely fail to understand how unreliable such testimony is. The court laid special emphasis on the proven invalidity of "the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection," noting that in some circumstances the accuracy of an identification is *inversely* related to the witness's apparent confidence. *Id.* at 490. The court specifically faulted this Court's approach in *Biggers*, noting that "several of the criteria listed by the Court [for determining reliability] are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies." *Id.* at 491.

The Utah Supreme Court followed the logic of *Long* to its inevitable conclusion in *State* v. *Ramirez*, 817 P.2d 774 (Utah 1991), holding that the *Biggers* test is an insufficient guarantee of due process under the Utah Constitution. See *id.* at 780-781. Rather than adopt a *per se* rule excluding unduly suggestive identifications, however, the court chose to fashion its own test, comparable to *Biggers* but "more empirically based" and more rooted in legitimate scientific consensus. See *id.* at 780. Among other differences, the court rejected the witness-certainty factor adopted in *Biggers* as empirically unsupported.

The Massachusetts Supreme Judicial Court went further in *Commonwealth* v. *Johnson*, 650 N.E.2d 1257 (Mass. 1995). Emphasizing the flaws in the empirical basis for this Court's holdings in *Biggers* and *Manson* (see *id.* at 1260 & n.5), and the "real threat to the truth-finding process of criminal trials" posed by suggestive eyewitness identification procedures (*id.* at 1261), the court held that the state constitution requires the *per se* exclusion of unnecessarily suggestive identifications. See *ibid.*

Most recently, after thirty years of adherence to the *Biggers* test, the Wisconsin Supreme Court has abandoned that approach. In *State* v. *Dubose*, 699 N.W.2d 582 (Wis. 2005), the court noted the wealth of new research over the past decade confirming that eyewitness testimony is often "hopelessly unreliable." *Id.* at 592 (quoting *Johnson*, 650 N.E.2d at 1262). Acknowledging that research and experience have undermined the foundations of the *Biggers* approach and shown the futility of attempting to distinguish between reliable and unreliable eyewitness testimony, the court adopted a new test: "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." *Id.* at 593-594. Though the court's focus was on showups, it also applied its test to an out-of-court photo identification. See *id.* at 596.

In addition to the cases explicitly rejecting the *Biggers* approach under state constitutional law, numerous other decisions by state courts of last resort point to the growing consensus that eyewitness testimony based on a suggestive identification is unreliable, and specifically that the witness-certainty factor is a poor indicator of reliability.

For example, the Georgia Supreme Court recently instructed Georgia trial courts to "refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in decid-

ing the reliability of [an] identification." *Brodes* v. *State*, 614 S.E.2d 766, 771 (Ga. 2005).

Similarly, the Connecticut Supreme Court recently noted that "[t]he uncontradicted scientific literature * * * suggests that the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness * * * and the accuracy of that identification," *Ledbetter*, 881 A.2d at 311; see also, *e.g.*, *Jones* v. *State*, 749 N.E.2d 575, 586 (Ind. 2001) (recognizing "the growing body of scientific work which has challenged many commonly held beliefs about eyewitness credibility"); *Commonwealth* v. *Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (rejecting instruction authorizing jury to "take into account * * * the strength of the identification"); *Rimmer* v. *State*, 825 So.2d 304, 337 (Fla. 2002) (Pariente, J., dissenting in part) ("Since *Neil* [v. *Biggers*] was decided, additional social science research, as well as actual cases, have taught us much about the fallibility of eyewitness identification.").

Notably, none of the state cases discussed above relies on specific provisions of state constitutional or statutory law that differ substantially from federal law. Rather, these courts have all recognized that the empirical foundation upon which this Court's holding in *Biggers* and *Manson* rested—the assumption that a court can accurately determine the reliability of a suggestive identification—is no longer tenable.

Meanwhile federal courts struggle to do justice within the defective framework of *Biggers*. See, *e.g.*, *Abdur-Raheem* v. *Kelly*, 98 F. Supp. 2d 295, 306 (E.D.N.Y. 2000) ("The value of at least two of the factors—accuracy of the witness'[s] prior description and certainty at the confrontation—has been seriously questioned. Based on empirical research into eyewitness identifications, these factors assign too much predictive value to eyewitness confidence and also to witnesses' descriptions, neither of which is very predictive of identification accuracy in scientific studies") (internal quotation marks

omitted), *vacated on other grounds by, grant of writ of habeas corpus ordered by, Abdur Raheem* v. *Kelly*, 257 F.3d 122, 141 (2d Cir. 2001); *United States* v. *Singleton*, 702 F.2d 1159, 1179 (D.C. Cir. 1983) (Wright, J., dissenting) ("[I]nnumerable authorities have concluded that a witness'[s] degree of certainty in making an identification generally does not measure its reliability. Indeed, a *negative* correlation sometimes exists between a witness'[s] confidence and the accuracy of the identification.") (emphasis in original) (internal citations to psychological research omitted); *Ocasio* v. *Artuz*, No. 98-CV-7925(JG), 2002 U.S. Dist. LEXIS 9790, *34 n.7 (E.D.N.Y. May 24, 2002) ("In truth, social science has convincingly revealed that there is little or no correlation between an eyewitness'[s] confidence in an identification and the accuracy of the identification.") (citing psychological research); *Smith* v. *Smith*, No. 02 Civ. 7308 (WHP) (JCF), 2003 U.S. Dist. LEXIS 17642, *36-37 (S.D.N.Y. Sept. 29, 2003) ("Studies have indicated that the empirical evidence does not support the idea that eyewitness confidence is a valid measure of eyewitness accuracy under ecologically valid conditions. One reason for this phenomenon is the malleability of eyewitness confidence.") (internal citation and quotation marks omitted).

This is an area in which this Court's guidance is urgently needed. The court should grant certiorari to reconsider the *Biggers* test and, specifically, to consider whether a witness's degree of certainty has a legitimate role in the reliability inquiry.

## III. Review Should Be Granted Because DNA Exonerations Of Individuals Whose Convictions Were Supported By Eyewitness Evidence Demonstrate That Continued Reliance On The *Biggers* Certainty Factor Undermines The Integrity Of The Judicial System.

The danger of allowing unreliable eyewitness evidence to go to the jury is dramatically demonstrated by recent DNA-

based exonerations. A report by the National Institute of Justice—a branch of the U.S. Department of Justice—reviewing 28 cases of defendants who were exonerated by DNA evidence concluded that "[i]n the majority of cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence." Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, Dept. of Justice Pub. No. NCJ 161258, 24 (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf. A subsequent study that added 12 cases to the 28 reviewed in the Department of Justice study found that *90%* of the wrongly convicted had been falsely identified through eyewitness testimony. *Recommendations for Lineups and Photospreads*, at 605. The study explained that in these 40 cases, "the kind of evidence that led to these wrongful convictions could have been anything. The fact that it happens to be eyewitness identification evidence lends support to the argument that eyewitness identification evidence is among the least reliable forms of evidence and yet persuasive to juries." *Ibid.*

The Innocence Project, a nonprofit legal organization dedicated to exonerating the wrongfully convicted, has reported that at last count 125 of the 163 defendants who have been exonerated through DNA evidence, or 77%, had convictions that were supported in part by eyewitness misidentifications. See http://www.innocenceproject.org/causes/mistakenid.php. In many of these cases, the exonerees tried to challenge the identification evidence used by the state as being suggestive. The courts found that the challenged identification evidence was reliable and admissible, contributing to a wrongful conviction. Only later after years of incarceration were these individuals exonerated through the use of DNA evidence. See *ibid.* These numbers should not be surprising given what we know about jurors overestimating eyewitness reliability and the fallibility of eyewitness identifications. See

also JIM DWYER, PETER NEUFELD, & BARRY SCHECK, ACTUAL INNOCENCE 41-77 (2000) (discussing misidentifcations and eyewitness testimony in cases of the wrongly convicted). The number of DNA exonerations where the conviction was based on eyewitness misidentifications demonstrates the inadequacy of the *Biggers* factors to determine the reliability of identification evidence once a court has determined the evidence was derived from suggestive procedures. And surely the number of defendants who, on the basis of misidentification, were wrongfully convicted of crimes for which no DNA evidence exists is many times the number exonerated by DNA testing. This is further evidence that the time has come for this Court to revisit *Biggers*.

**IV. Stare Decisis Is No Bar To Granting The Petition.**

"When governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. [The Court's] willingness to reconsider [its] earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63 (1996) (internal citations and quotation marks omitted).

In *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), the Court listed several factors to be considered when deciding whether to overturn one of its prior precedents. These factors include: "whether the rule has proven to be intolerable simply in defying practical workability"; "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854-855 (internal citations and quotation marks omit-

ted). See also *Atkins* v. *Virginia*, 536 U.S. 304, 306-307 (2002) (overturning the Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1998) by evaluating the consensus reached by the "American public, legislators, scholars, and judges" in deliberating over the question whether executing mentally retarded persons violates the Eighth Amendment).

Several of these factors weigh strongly in favor of overturning the Court's decisions in *Biggers* and *Manson* to the extent that these decisions require courts to evaluate the level of certainty of a witness in determining the reliability of evidence that was derived from unnecessarily suggestive identification procedures.

Most importantly, the psychological research on eyewitness identifications has "robbed the old rule of significant application or justification" because the foundations of the Court's analysis have been undermined. The Court selected the level of certainty of the witness as one of the *Biggers* factors assuming that it would provide courts with an indication of the reliability of the identification. The consensus in the research literature on the certainty of a witness has shown that the Court's assumption is false. Because this is a constitutional rule, the Court must address this question as other courts are bound to follow this Court's precedent.

Overruling this portion of *Biggers* and *Manson* would not impose a special hardship because courts would still consider the other four *Biggers* factors, and would still be bound by the Court's primary holding that identification evidence that is the product of unnecessarily suggestive identification procedures must be determined to be independently reliable before such evidence is admitted to a jury.

Finally, although courts may find the "certainty" factor workable—in that it is a fact that can be readily determined—the "certainty" factor does not achieve its intended purpose of determining whether tainted evidence is nonethe-

less reliable. Therefore, the certainty factor is not "workable" in the most fundamental sense.

Thus, this Court should not rely on the principle of stare decisis to refuse to revisit *Biggers*, given the overwhelming consensus that the witness-certainty factor identified in *Biggers* is scientifically unsupportable.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2005

# APPENDICES

# APPENDIX A

## UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

V.

JOSE ANTONIO PEREZ, AKA TONY, RAYMOND PINA, AKA SHORTY, DEFENDANTS-APPELLANTS.

DOCKET NOS. 03-1445(L), 04-0751-CR(CON).

ARGUED: MAY 26, 2005.
DECIDED: JULY 11, 2005.

Before: CALABRESI, KATZMANN, and B.D. PARKER, Circuit Judges.

PER CURIAM.

Defendant-Appellant Jose Antonio Perez ("Perez"), a member of the "Perez Organization," appeals from the judgment of the district court (Arterton, J.), convicting him on five counts[1] related to the murder-for-hire killing of Theo-

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[1] The five counts were:

1. Conspiracy to commit murder-for-hire involving interstate travel or the use of an interstate facility, in violation of 18 U.S.C. § 1958,

2. Using interstate travel for murder-for-hire, with the intent that the murder be committed in violation of federal or state laws as consideration for the promise to pay something of value, 18 U.S.C. § 1958,

3. Using an interstate facility for murder-for-hire, with the intent that the murder be committed in violation of federal or state laws as consideration for the promise to pay something of value, 18 U.S.C. § 1958,

4. Committing a violate crime in aid of racketeering (VICAR), under 18 U.S.C. §§ 1959(b)(2), 1961, and

dore Casiano ("Casiano"), the leader of a rival narcotics organization in Hartford, Connecticut. Perez was sentenced to four concurrent terms of life imprisonment and one consecutive five-year term.[2]

Most of Perez's claims on appeal have been denied in an unpublished summary order, which we issue together with this opinion, see *United States* v. *Perez*, 138 Fed. Appx. 379 (2d Cir. 2005). We write here separately to address a question that, for this circuit, is one of first impression: whether a defendant can be convicted of using a facility in interstate commerce with the intent that a murder-for-hire be committed when the defendant's usage of that facility is wholly *intrastate*.

## I.

In May 1996, in retaliation for the Savage Nomads' aggressive efforts to regain their share of the Hartford area's narcotics trade,[3] members of the Perez Organization decided that Casiano should be killed. Accordingly, a professional "hit man" (and his associates) from the Bronx was hired to travel to Connecticut to murder Casiano.

For purposes of the legal question before us, it suffices to say that one of Perez's responsibilities—and the only one

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5. Causing death by use of a firearm during a crime of violence, 18 U.S.C. §§ 924(c), 924(j)(1), 2.

[2] Raymond Pina, who was tried with Perez, withdrew his appeal prior to the date of oral argument.

[3] Casiano had been the leader of a gang called the Savage Nomads. The Nomads were, among other things, heavily involved in the sale of narcotics. While Casiano was in federal prison, the Savage Nomads' market share declined considerably—and they lost particular ground to the Perez Organization, which at all times was led by the appellant's brother, Wilfredo Perez. Ever since Casiano was released from prison in 1995, tension between the Savage Nomads and the Perez Organization ran high.

currently at issue—was to call Casiano on the telephone (as well as "page" his beeper) and invite him to a meeting, ostensibly to resolve their differences, at Perez Auto, a garage in Hartford owned by Wilfredo Perez. In fact, however, Perez was luring Casiano to the garage to give the hit men a clear opportunity to kill their target.

It was established at trial, by a representative of the local telephone company ("Southern New England Telephone" or "SNET"), that the calls made by Perez to Casiano on the day of the shooting were wholly intrastate calls. That is, the calls did not require any switching or routing connections outside of the State of Connecticut. As a general matter, however, SNET did provide local customers with access to long-distance calling plans and, as such, the SNET network was undeniably a facility involved in interstate communication.

## II.

Perez argues that, because his calls to Casiano from Perez Auto were local and did not involve any interstate communication, he should not have been found guilty under 18 U.S.C. § 1958, which proscribes the use of interstate facilities in the commission of a murder-for-hire.[4]

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[4] Prior to amendment in 2004, 18 U.S.C. § 1958 read:

> Use of interstate commerce facilities in the commission of murder-for-hire
>
> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this

He notes that § 1958(a)—the substantive subsection of the provision, uses the language: "Whoever ... uses ... any facility in interstate ... commerce ...." (emphasis added). By contrast, § 1958(b)—the definitional subsection—describes "facility *of* interstate commerce" (emphasis added) to include means of transportation and communications. Perez therefore contends that the meaning in § 1958(a) is narrower than § 1958(b). In other words, whereas "use of a facility of interstate commerce" (subsection (b)) applies to any use of a facility that happens—at times—to be involved in interstate commerce, "use of a facility in interstate commerce" (subsection (a)) requires the defendant to have actually used the facility in its interstate capacity in furtherance of the murder-for-hire.

There is a circuit split on the question of whether the actual use by the defendant must be an interstate one. Supporting the position taken by the district court in the instant case—that is, not requiring an actual interstate usage—are opinions by the Fifth and Seventh Circuits. See *United States* v. *Marek*, 238 F.3d 310, 313 (5th Cir. 2001) (en banc) (holding that § 1958(a)'s "use of a facility in interstate commerce"

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title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $ 250,000, or both. (b) As used in this section and section 1959 [18 U.S.C. § 1959]—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

is synonymous with § 1958(b)'s "use of a facility *of* interstate commerce" and therefore that § 1958(a) satisfies the jurisdictional element of the federal murder-for-hire statute, irrespective of whether the particular usage in question was itself interstate or intrastate, so long as the facility is one involved in interstate commerce); *United States* v. *Richeson*, 338 F.3d 653, 660 (7th Cir. 2003) ("We wholly agree with the Fifth Circuit that § 1958's construction, plain language, context in the realm of commerce clause jurisprudence, and legislative history all lead to the conclusion that 'it is sufficient [under § 1958] that the defendant used an interstate commerce facility in an *intra* state fashion.'" (quoting *Marek*, 238 F.3d at 315)).

Bolstering Perez's claim, at least to a limited extent, is an opinion of the Sixth Circuit, as well as two district court decisions in our circuit. See *United States* v. *Weathers*, 169 F.3d 336, 341-43 (6th Cir. 1999) (holding that the communication itself involved in the murder-for-hire conspiracy must affect interstate commerce); *United States* v. *Paredes*, 950 F. Supp. 584, 590 (S.D.N.Y. 1996) (holding that an intra state "page" was insufficient to establish jurisdiction even when pager company itself also had the capacity to transmit—and regularly did transmit—its signals inter state); *United States* v. *Stevens*, 842 F. Supp. 96, 98 (S.D.N.Y. 1994) (holding that intra state "page" to a beeper was sufficient to establish murder-for-hire jurisdiction only because the pager company transmitted its signals through an interstate facility). But see *United States* v. *Cope*, 312 F.3d 757, 771 (6th Cir. 2002) (limiting *Weathers* to its facts).

We adopt the reasoning of *Marek* and today hold that the phrases "facility of interstate commerce" and "facility *in interstate* commerce" are to be used *interchangeably*. See *Marek*, 238 F.3d at 321. Moreover, we agree with the Government's argument that taking "in" and "of" to connote different scopes of coverage is difficult to square with the structure of the statute, which makes "the use of a facility *in*

interstate commerce" part of the substantive law of § 1958(a), and defines "facility *of* interstate commerce" in § 1958(b). If the phrases have different meanings, then § 1958(b) defines a phrase with no application to the substantive offense, and leaves undefined the phrase that does appear in the substantive law.[5] We note that the question we settle today will have little importance going forward, as Congress has recently amended the statute to eliminate any confusion over the scope of § 1958(a).

## III.

As a result, even though Perez's calls to Casiano were wholly intrastate communications, the fact that they were made using the SNET network, a facility involved in interstate commerce, leads us to conclude that Perez was properly subject to prosecution for using interstate commerce facilities in the commission of murder-for-hire. Accordingly, we AFFIRM the judgment of the district court.

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[5] The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, in part amended § 1958(a) by striking "facility in" and replacing it with "facility of." This specific amendment was entitled "Clarification of Definition" and purported to seek to eliminate any confusion that had previously existed, as evidenced by the circuit split. Because we agree with the Fifth Circuit, we, also, view what Congress was doing as clarifying rather than expanding the scope of the criminal law.

## APPENDIX B

## UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

V.

JOSE ANTONIO PEREZ, AKA TONY, RAYMOND PINA, AKA SHORTY, DEFENDANTS-APPELLANTS.

DOCKET NO. 03-1445.

JULY 11, 2005.

Appeal from the United States District Court for the District of Connecticut (Arterton, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the case be AFFIRMED.

Present: CALABRESI, KATZMANN, and B.D. PARKER, Circuit Judges.

### SUMMARY ORDER

Defendant-Appellant Jose Antonio Perez ("Perez") was convicted by a jury on five counts related to the murder-for-hire killing of Theodore Casiano, the leader of a rival narcotics organization in Hartford, Connecticut, and sentenced to four concurrent terms of life imprisonment and one consecutive five-year term. We assume familiarity with the facts, the procedural history, and the issues on appeal, and also cross-reference this panel's accompanying per curiam, which addresses a question of law that this circuit has not previously had occasion to consider. See *United States* v. *Perez*, 414 F.3d 302 (2d Cir. 2005).[1]

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[1] Raymond Pina, who was tried with Perez, withdrew his appeal prior to the date of oral argument.

On appeal from his conviction and sentence from the judgment of the district court (Arterton, J.), Perez raises a cavalcade of claims centered around seven principal allegations: (1) that, because he joined the criminal enterprise only after that crime had been completed, the district court erred in denying his Rule 29(c) motion for judgment of acquittal on several federal murder-for-hire counts, 18 U.S.C. § 1958; (2) that, because 18 U.S.C. § 1959 does not cover the act of aiding and abetting in the commission of predicate violent crimes in aid of racketeering ("VICAR") offense, the district court erred in denying his Rule 29(c) motion for judgment of acquittal on one count of aiding and abetting in the commission of a "VICAR" murder, under that section of the criminal code; (3) that the district court erred in failing to instruct the jury on the elements of aiding and abetting under Connecticut law; (4) that, because he was not acting in furtherance of any racketeering enterprise, Perez could not be held liable under the VICAR statute; (5) that the district court committed clear error in admitting a suggestive and unreliable out-of-court identification; and (6) that the district court abused its discretion in admitting testimony regarding his co-conspirators' possession of weapons and narcotics. A seventh claim, involving the question of whether a conviction for using a facility in interstate commerce in the commission of a murder-for-hire is appropriate when the actual usage of that facility by the defendant in a particular instance is wholly intrastate, raises issues of first impression that require a published opinion.

Perez's argument, that he could not be part of the conspiracy to commit federal murder-for-hire because that conspiracy was completed before he ever became involved, is without merit. Irrespective of whether his co-conspirators satisfied the basic elements of conspiracy prior to Perez's arrival, the fact that there were more instances of planning murder-for-hire using interstate travel and facilities *after*

Perez joined is sufficient to establish a basis for his conviction.[2]

Perez claims that 18 U.S.C. § 1959(a) does not apply to persons who only aid and abet another individual in the commission of a predicate VICAR offense. But, "murder" in § 1959(a) is defined according to the state or federal law controlling the predicate murder offense. See *United States* v. *Mapp*, 170 F.3d 328, 335-36 (2d Cir. 1999). Under Connecticut law, Conn. Gen. Stat. §§ 53a-54a, 53a-8, and under the federal murder-for-hire provision, 18 U.S.C. § 1958, accomplice liability is built into the respective murder statutes—and therefore Perez's aiding and abetting constitutes murder under the VICAR statute, too.

Perez's argument that the district court failed to instruct the jury on the elements of aiding and abetting under Connecticut state law, too, is without merit. Given that the district court issued the comparable federal aiding-and-abetting charge and also given the fact that we review only for plain error (since Perez failed to object at the time of the charge), we reject this claim. See *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *United States* v. *Whab*, 355 F.3d 155, 158 (2d Cir. 2004).

With respect to the contention that Perez was not acting to further a racketeering enterprise, we conclude that there was sufficient evidence for the jury to find that he had been doing precisely that. See *United States* v. *Bruno*, 383 F.3d 65, 83 (2d Cir. 2004).

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[2] Because Perez's corollary claims—(a) that he cannot be convicted of using interstate travel to commit federal murder-for-hire, (b) that he cannot be convicted of aiding and abetting federal murder-for-hire, and (c) that he cannot receive a firearm enhancement in conjunction with federal murder-for-hire—rest entirely on this same argument, they likewise are unavailing.

The claim that the district court improperly admitted a suggestive and unreliable out-of-court identification also fails. The district court conducted a multi-day Wade hearing, see *United States* v. *Wade*, 388 U.S. 218 (1967), and reasonably determined that though the procedures used in obtaining the identification of Perez were suggestive, the identification by one of his co-conspirators was itself reliable. See *Raheem* v. *Kelly*, 257 F.3d 122, 133 (2d Cir. 2001); see also *United States* v. *Simmons*, 923 F.2d 934, 950 (2d Cir. 1991) (noting that an out-of-court identification tainted by procedures which were unduly suggestive may still be admissible if "it possesses sufficient indicia of reliability"). Based on the district court's analysis in accordance with the five-part reliability test, see *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), we conclude that there was no clear error. See *United States* v. *Finley*, 245 F.3d 199, 203 (2d Cir. 2001).

Finally, the district court did not abuse its discretion in admitting testimony regarding the possession of weapons and narcotics by Perez's co-conspirators. See *United States* v. *Becerra*, 97 F.3d 669, 671 (2d Cir. 1996).

We have here considered all of Perez's claims, except for those involving whether Perez was properly convicted for using a facility in interstate commerce in the commission of murder-for-hire, and find the ones addressed above to be without merit. The judgment of the district court is therefore AFFIRMED.

## APPENDIX C

## UNITED STATES DISTRICT COURT, D. CONNECTICUT

UNITED STATES

V.

PEREZ ET AL.

NO. 3:02CR7 (JBA).

MARCH 7, 2003.

Ruling on Motion to Suppress Identification [Doc. # 264]

ARTERTON, District Judge.

Defendant Jose Antonio Perez has moved to suppress a December 10, 2001 photo array identification of him by Mario Lopez and any in court identification of him based on the photo array. A *Wade* hearing[1] was held at which DEA Special Agent Chris Matta and Lopez testified, and pertinent notes from Government interviews with Lopez were introduced into evidence. For the reasons set out below, the motion is DENIED.

### I. Background

At the hearing, Agent Matta testified that during a May 25, 2001 interview with Lopez, Lopez described the "owner" of Perez Auto (a Hartford auto repair shop Lopez was taken to on May 23 and 24, 1996) as having a ponytail, being eight

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[1] See *United States* v. *Wade*, 388 U.S. 218 (1967); see also *Watkins* v. *Sowders*, 449 U.S. 341, 349 (1981) ("A judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable.").

years older than Lopez, and having no facial hair.[2] Notes taken by the Assistant U.S. Attorney during that same interview recount that Lopez described the owner as "dark skinned." At the December 10, 2001 identification session, the DEA report prepared by Matta recounts Lopez's description of the "owner" as looking "indian" (but not Native American or from India) because the "owner" was dark and had what Lopez called a year-round tan. Lopez also stated that the "owner" had long hair and facial hair.[3] Agent Matta's notes of the December 10, 2001 interview use the descriptor "indian" seven times in reference to the "owner." At the December 10, 2001 interview, Lopez was shown three photo arrays. He identified defendant Raymond Pina by name, designated defendant Wilfredo Perez as looking familiar, and

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[2] While defendant's post-hearing brief [Doc.# 359] states that Lopez described the "owner" as being taller than he (Lopez) and weighing between 175 and 190 pounds, this is not supported by the testimony at the hearing or the exhibits, as this description (found in Agent Matta's May 25, 2001 notes [Ex. B] ) is in reference to Ollie Berrios: the notes first describe someone as having long hair, being eight years older than Lopez, having a ponytail and no facial hair, and then (several lines down) describe a second "brother." This second brother is described as taller than Lopez and between 175 and 190 pounds. Agent Matta's testimony at the hearing made clear that the only description given by Lopez of the "owner" at the May 25, 2001 meeting was of the "owner" as having long hair, being eight years older than Lopez, having a ponytail and no facial hair. Defendant's confusion no doubt arises from the confusing label of "brother" given to both the "owner" and Berrios, although this labeling choice is explained by Agent Matta's belief at the time that Berrios and the "owner" were brothers (hence both would be appropriately labeled "brother").

[3] There is a discrepancy as to whether Lopez's description of the "owner" prior to the December 10, 2001 interview included having facial hair. Matta testified that Lopez had so stated but was unable to reference any report or interview notes reflecting such a description.

identified Jose Antonio Perez as the "owner." Lopez was once again shown the Wilfredo Perez photo array, about which he said the person he designated as familiar looked like the "owner" but his face was too fat and his complexion too light.

At the *Wade* hearing, Lopez testified that he had met the "owner" on two consecutive days at the auto shop in the summer of 1996, but could not specify the dates or the city in which the shop was located. Lopez testified that the "owner" was five feet eight inches to five feet ten inches tall, weighed between 180 and 200 pounds, had hair tied in a ponytail, and was Puerto Rican. He testified that the "owner" was wearing a motorcycle jacket and leather boots, jeans, possibly a gold chain tucked under his t-shirt. He stated that the "owner" was older than he (Lopez), possibly between 37 and 40 years of age. He described the owner as looking "indian," which he specified meant dark-skinned or light dark-skinned. Finally, he described the "owner" as having light facial hair and possibly a full goatee.

**II. Analysis**

"When objection is made to a pre-trial identification, an analysis of whether the witness may identify the defendant at trial generally involves a two-step inquiry." *United States* v. *Tortora*, 30 F.3d 334, 338 (2d Cir. 1994). First, the Court must determine whether the identification procedures "unduly and unnecessarily suggested that the defendant was the perpetrator." *Raheem* v. *Kelly*, 257 F.3d 122, 133 (2d Cir. 2001). If not, there is no due process obstacle to admissibility of a subsequent in court identification, and the reliability of an eyewitness identification is a matter for the jury. *Id.* (citations and quotations omitted). "If the court finds, however, that the procedures were suggestive, it must then determine whether the identification was nonetheless independently reliable. * * * In sum, the identification evidence will be admissible if (a) the procedures were not suggestive or (b) the

identification has independent reliability." *Id.* (citations omitted); see also *Manson* v. *Brathwaite*, 432 U.S. 98, 112 (1977) ("*Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.").

On every occasion that Lopez has been asked to describe the "owner" (the May 25 and December 10, 2001 interviews, as well as the *Wade* hearing) his description has included the subject's dark skin, and he specifically distinguished the photograph of Jose Antonio Perez (whom he identified as the "owner") from the photograph of Jose Antonio Perez's similar-looking brother, Wilfredo Perez, on the grounds that, *inter alia*, Jose Antonio Perez had a darker complexion. In the eight photographs presented in the photo array, Jose Antonio Perez's photograph is undisputedly the darkest, notably more so than all others. While Jose Antonio Perez does not appear in court to be a markedly dark-skinned person, what is relevant is that Lopez considered him dark-skinned after seeing him during the two-day period in 1996. See *Raheem*, 257 F.3d at 134 ("Where one witness has emphasized a particular characteristic of the perpetrator in giving a description to the police, a lineup in which only the defendant has that characteristic may well taint the identification of the defendant only by that viewer."). Given Lopez's repeated reference to Jose Antonio Perez's dark complexion on every occasion, and given his further use of Jose Antonio Perez's skin color as a distinguishing referent in examining another photo array, the Court concludes that the use of Jose Antonio Perez's dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure which was unduly suggestive to Lopez. See *id.* at 135-137 (lineup in which defendant appeared in a black leather coat was suggestive to two witnesses who had given the police descriptions that emphasized the suspect's black leather coat); *United States* v. *Eltayib*, 88 F.3d 157, 166-167 (2d Cir. 1996) (photo array unduly suggestive where witness had described

perpetrator as having "a head full of hair, real bushy hair, afro-type hair," defendant's photo was the only one showing a full head of hair, and the other photos pictured subjects with darker skin than the defendant).[4]

The Court's conclusion that the December 10 photo array was unduly suggestive does not end the matter, however, as the suggestive pretrial identification and any subsequent in-court identification may still be admissible if such identifications are nonetheless independently reliable. See *United States* v. *Simmons*, 923 F.2d 934, 950 (2d Cir. 1991) ("even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability") (citation omitted); *United States* v. *Salameh*, 152 F.3d 88, 126 (2d Cir. 1998) ("A witness who identified a defendant prior to trial may make an in-court identification of the defendant if ... the in-court identification is independently reliable, even though the pretrial identification was unduly suggestive.") (citations omitted). The standard for assessing independent reliability is almost identical for both pretrial identifications and subsequent in-court identifications, see *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972); see also 2 LaFave et al., Criminal Procedure § 7.4(c)

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[4] The dispute over whether Lopez had described Perez as having facial hair or not is immaterial to the question of undue suggestion because the presence or absence of facial hair would not have made Perez's photo stand out from the others: each photograph in the array pictured a subject with facial hair. See *United States* v. *Thai*, 29 F.3d 785, 808 (2d Cir. 1994) ("If there is nothing inherently prejudicial about the presentation, such as use of a very small number of photographs or the utterance of suggestive comments before an identification is made, the principal question is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit.") (internal citations, quotations and alterations omitted).

at 673-674 (2d ed. 1999)[5], requiring evaluation of the "totality of circumstances," *Neil*, 409 U.S. at 199. In making this determination, the factors to be considered "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

Having spent some time with Jose Antonio Perez on two consecutive days, Lopez had a significant opportunity to view him. Lopez testified that on the first day, he saw the "owner" (the man he subsequently identified in the photo spread in question) in the office and bay area of the Perez auto shop and outside in front of the garage. He was with Jose Antonio Perez in the office for between five and fifteen minutes, then walked outside with him to view a Grand National which Jose Antonio Perez owned in which Lopez was interested, for between five and ten minutes. On the second day, he again saw Jose Antonio Perez when the latter came into the office and mechanics' bay area. He recalled overhearing a conversation between Ollie Berrios and Jose Antonio Perez in which Jose Antonio Perez stated that once the job was complete, he was going to give the money to his "brother," referring to Berrios. Later that day, Lopez saw Jose Antonio Perez in the bay area making a telephone call, and subsequently saw him come into the office area and speak with the victim. These repeated opportunities to view Jose Antonio Perez are strong evidence of independent reliability.

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[5] "It is unlikely but theoretically possible that there could be a risk of misidentification which was substantial but not irreparable, meaning that ... the pretrial identification would be suppressed but not the at-trial identification by the same person." (footnote omitted).

Lopez's degree of attention adds somewhat to the reliability of his identification of Jose Antonio Perez. Lopez testified that he was aware by the second day of his role in the events (that he would be driving the motorcycle from which a shooter would kill the victim), thus supporting an inference that "the circumstances prompted a high degree of attention by the witness." LaFave, *supra*, § 7.4(c) at 675 (footnote omitted). This inference is buttressed by Lopez's ability to remember in great detail the layout of the auto shop, as well as details such as the make of a car (Corvette) on the lift in the shop and the color of the van (sky blue) in which he was riding.[6] Lopez's testimony at the hearing, with its relatively detailed description of the "owner," further shows that Lopez had a high degree of attention. The otherwise strong showing on this factor is diminished somewhat, however, by Lopez's statements on cross examination that his memory was not

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[6] Defendant discounts Lopez's degree of attention, arguing that he was able to recall only details of those things he cared about (automobiles and motorcycles in the shop), and not facial features or other physical characteristics of the people he observed. This contention is belied by Lopez's relatively detailed *Wade* hearing description of Jose Antonio Perez. While Lopez's May 25 and December 10, 2001 descriptions of Jose Antonio Perez to Agent Matta are less than comprehensive, the record is scant as to what degree of detail was sought by Agent Matta's questions about Jose Antonio Perez's appearance. Finally, there is no evidence that Lopez's recollection was in any way bolstered or aided prior to the *Wade* hearing, and thus no reason to believe that his detailed *Wade* hearing description of Jose Antonio Perez does not reflect his true attention to detail during the 1996 encounter.

Similarly, defendant's contention that Lopez's belief that Jose Antonio Perez "owned" the garage (when in fact Jose Antonio Perez does not actually hold title to the garage) shows Lopez's lack of attention to detail (and thus undercuts the reliability of Lopez's independent recollection) lacks merit. The record is silent as to why Lopez considered Jose Antonio Perez to be the "owner" and thus it is unknown what caused his erroneous belief.

good because of stress and that at times he was not paying particular attention to the owner.

The accuracy of Lopez's description of Jose Antonio Perez weighs slightly in favor of a conclusion of independent reliability. Lopez's *Wade* hearing description of the "owner" as between 37 and 40 at the time of their summer 1996 encounter is close to Jose Antonio Perez's January 2, 1960 date of birth.[7] While defense counsel argues that the description given by Lopez at the hearing is inaccurate because Jose Antonio Perez is allegedly only five feet seven inches[8] (while Lopez testified five feet eight inches to five feet ten inches tall), the difference in perceived height of an inch or two is not significant, particularly as it could be attributable to the heel height of the leather boots that Lopez testified Jose Antonio Perez had been wearing. Cf. *Dunnigan* v. *Keane*, 137 F.3d 117, 130 (2d Cir. 1998) (two inch height discrepancy in identification was not substantial "given that, while in [the witness's] presence, the robber was not standing still but was squatting, running, or sitting"). The facial hair issue detracts somewhat, however, because the photograph of Jose Antonio Perez used in the photo array (which was taken close in time to Lopez's 1996 meeting with Jose Antonio Perez[9] distinctly shows Jose Antonio Perez with facial hair (both a goatee and a mustache), but Lopez initially told Matta that Jose Antonio Perez had no facial hair (although he may have later described him with facial hair, see *supra* note 3) and testified at the hearing that Jose Antonio Perez had only a light mustache and possibly a goatee.

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[7] See Govt's Response Ex. E (Hartford Police mug shot listing Jose Antonio Perez's date of birth).

[8] There is no evidence of his actual height in the record.

[9] As defendant's post-hearing brief notes, see [Doc. # 359] at 4, Agent Matta testified that the photo of Jose Antonio Perez used in the photo array was taken on June 1, 1996.

Lopez's level of certainty in his identification of Jose Antonio Perez also weighs in favor of a conclusion of independent reliability. In contrast to Lopez's designation of Wilfredo Perez's photograph only as looking familiar (and not as someone he recalled seeing at the auto shop on either of the two days in 1996), he testified to no uncertainty as to his identification of Jose Antonio Perez as the owner. Defense counsel concedes that Lopez appeared certain of this identification.

The five year time lapse between Lopez's observing Jose Antonio Perez and Lopez's selecting his photo from the photo array weighs against a finding of independent reliability, as the Government concedes. *Cf. Neil*, 409 U.S. at 201 ("There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases."). Further time will have passed before any in-court identification is made. This significant lapse is not dispositive, however, as similar lapses have not automatically presented insurmountable barriers. See *United States* v. *Kwong*, 69 F.3d 663, 667 (2d Cir. 1995) (five year passage of time outweighed by other factors evidencing reliability) (*citing Tortora*, 30 F.3d at 338-339 (same) and *United States* v. *Hill*, 967 F.2d 226, 232-233 (6th Cir. 1992) (same)).

In considering the *Neil* factors in light of the totality of the circumstances, the Court concludes that Lopez's significant opportunity to view Jose Antonio Perez, coupled with the showing of a fair degree of attention and significant level of certainty, is sufficient to counterbalance: (1) the lengthy passage of time between the 1996 encounter and both the 2001 identification and any future in-court identification, and (2) "the corrupting effect of the suggestive confrontation," *Dunnigan*, 137 F.3d at 128 (citations omitted). Lopez's two-day opportunity to view Jose Antonio Perez significantly exceeded what has been held sufficient in other cases. See, *e.g.*, *United States* v. *Wong*, 40 F.3d 1347, 1360 (2d Cir. 1994)

(two to three seconds during restaurant murder); Salameh, 152 F.3d at 126-127 (time spent pumping gas); *United States* v. *Jacobowitz*, 877 F.2d 162, 168 (2d Cir. 1989) (five minutes in a well-lighted hotel lobby plus a "brief[]" delivery of tickets to hotel room); see also *United States* v. *Frank*, No. 97cr269(DLC), 1998 WL 292320 at *3 (S.D.N.Y. June 3, 1998) (summarizing additional cases); cf. *Ocasio* v. *Artuz*, No. 98-CV-7925(JG), 2002 WL 1159892 at *11 (E.D.N.Y. May 24, 2002) (independent reliability based almost exclusively on witness's extensive opportunity to view defendant).

The Court's conclusion is one of "a threshold level of reliability" only, with doubts about the reliability of the identification "go[ing] only to the identification's weight, not to its admissibility," *Dunnigan*, 137 F.3d at 128 (citations omitted), and the significant time gap will presumably be fertile ground for cross examination and argument to the jury:

> It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness—an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart the 'integrity' of the adversary process. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

*Manson*, 432 U.S. at 113 n. 14 (quoting *Clemons* v. *United States*, 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring)) (internal quotations and alterations omitted).

**III. Conclusion**

For the reasons set out above, the Court concludes that although the photo array was unduly suggestive, there exists a sufficient independent basis for Lopez's identification of Jose Antonio Perez such that admitting Lopez's identification testimony would work no due process violation. Jose Antonio Perez's motion to suppress identification testimony [Doc. # 264] is DENIED.

IT IS SO ORDERED.

JAN 30 2006
OFFICE OF THE CLERK

No. 05-596

# In the Supreme Court of the United States

JOSE ANTONIO PEREZ, AKA TONY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

*Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), hold that, in deciding whether an out-of-court identification was reliable, and therefore admissible, despite an unduly suggestive identification procedure, a trial court should consider a number of factors, including the level of certainty demonstrated by the witness. The question presented is whether *Biggers* and *Brathwaite* should be overruled insofar as they include the witness's certainty on the list of factors to be considered.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 7a-10a) is not published in the *Federal Reporter* but is reprinted in 138 Fed. Appx. 379. The opinion of the district court (Pet. App. 11a-21a) is reported at 248 F. Supp. 2d 111. An opinion of the court of appeals deciding an issue not raised in the petition (Pet. App. 1a-6a) is reported at 414 F.3d 302.

### JURISDICTION

The judgment of the court of appeals was entered on July 11, 2005. On October 5, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 10, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy to commit murder for hire, interstate travel to commit murder for hire, and using an interstate facility to commit murder for hire, in violation of 18 U.S.C. 1958; committing a crime of violence in aid of racketeering, in violation of 18 U.S.C. 1959; and causing death by use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1). He was sentenced to four concurrent terms of life imprisonment and one consecutive term of five years of imprisonment. The court of appeals affirmed.

1. After his release from federal prison in early 1995, Teddy Casiano returned to Hartford, Connecticut, where he resumed his leadership of a gang called the Savage Nomads. In the meantime, a family-based drug organization led by Wilfredo Perez, David Perez, and petitioner (the Perez organization) had been reaping large profits through the sale of kilogram quantities of cocaine at an establishment in Hartford called the Hour Glass Café. Casiano became angry that the Perez organization refused to pay sufficient respect to the Savage Nomads and did not provide him with a greater share of the profits from its drug business. In late 1995, Casiano and his gang kidnapped Ollie Berrios, a member of the Perez organization; forced him to reveal where the Perezes kept their drugs and money; and then stole a large quantity of cocaine and cash. Gov't C.A. Br. 5-9.

Tensions between Casiano and the Perez organization continued to mount until, in May 1996, Wilfredo Perez concluded that Casiano had to be killed. Berrios and his friend Santiago Feliciano recruited Fausto Gon-

zalez and Mario Lopez to do the job. Together with Berrios and Feliciano, Gonzalez and Lopez then met with Wilfredo Perez and petitioner at Perez Auto, a garage that Wilfredo Perez owned and operated, to plan the murder. Gov't C.A. Br. 9-12.

The next day, May 24, 1996, Gonzalez and Lopez traveled from the Bronx, New York, to Connecticut and again met with Wilfredo Perez and petitioner. Wilfredo Perez gave Berrios $6000 to pay Gonzalez once Casiano was killed, and petitioner agreed to let Berrios use his Cadillac to take Gonzalez and Lopez back to New York after the killing. Wilfredo Perez and petitioner then lured Casiano to the garage. After Casiano left, Lopez and Gonzalez followed him on a motorcycle driven by Lopez. The motorcycle pulled up to Casiano's car, and Gonzalez killed Casiano by shooting him several times at point-blank range. Once Gonzalez and Lopez were in petitioner's Cadillac, Berrios gave Gonzalez the $6000. Petitioner was observed at the scene of Casiano's murder, and acknowledged that Casiano had been at the garage shortly before the killing. Gov't C.A. Br. 12-17.

2. A few months after Casiano's murder, members of the Perez organization, including petitioner, were indicted on federal drug charges. Petitioner ultimately pleaded guilty to conspiracy to distribute more than five kilograms of cocaine. In January 2002, petitioner, Wilfredo Perez, and others were charged in a separate indictment with five offenses relating to Casiano's murder. Gov't C.A. Br. 3-4, 17.

3. On December 10, 2001, in an out-of-court photo-array identification procedure, Lopez had identified petitioner, among the eight men depicted in the array, as the "owner" of Perez Auto. Petitioner filed a motion to suppress the identification, on the ground that the photo

array was unduly suggestive. He argued that Lopez had described the "owner" as having dark skin, and that petitioner had the darkest skin of any of the men pictured in the array. Pet. App. 11a, 14a.

The district court held a hearing pursuant to *United States* v. *Wade*, 388 U.S. 218 (1967), to determine whether to admit Lopez's out-of-court identification at petitioner's trial. Chris Matta, a Special Agent with the Drug Enforcement Administration, and Lopez testified at the hearing. Lopez described the "owner" of Perez Auto in significant detail, based on their two meetings at the garage. Pet. App. 11a-13a.

4. The district court denied the motion to suppress. Pet. App. 11a-21a.

The court agreed with petitioner that the use of his "dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure which was unduly suggestive." Pet. App. 14a. Recognizing that a "suggestive pretrial identification and any subsequent in-court identification may still be admissible if such identifications are * * * independently reliable," *id.* at 15a, the court then applied the standard for assessing independent reliability set forth in *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). Under that standard, the court said, it was required to evaluate the "totality of the circumstances," including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Pet. App. 16a (quoting *Biggers*, 409 U.S. at 199-200). Of those five

factors, the court determined that four weighed in favor of an independently reliable identification. *Id.* at 16a-20a.

First, the court found that Lopez had "spent some time with [petitioner] on two consecutive days," and thus had had "a significant opportunity to view him." Pet. App. 16a. The court concluded that Lopez's "repeated opportunities to view [petitioner] are strong evidence of independent reliability." *Ibid.* Indeed, the court noted that "Lopez's two-day opportunity to view [petitioner] significantly exceeded what has been held sufficient in other cases." *Id.* at 19a-20a (citing cases).

Second, the court found that "Lopez's degree of attention adds somewhat to the reliability of his identification." Pet. App. 17a. The court relied, in part, on "Lopez's ability to remember in great detail the layout of the auto shop, as well as details such as the make of a car (Corvette) on the lift in the shop and the color of the van (sky blue) in which he was riding." *Ibid.* Pointing to Lopez's "relatively detailed" description of petitioner at the *Wade* hearing, the court rejected petitioner's contention that Lopez did not pay close attention to "facial features or other physical characteristics of the people he observed." *Id.* at 17a n.6.

Third, the district court found that "[t]he accuracy of Lopez's description of [petitioner] weighs slightly in favor of a conclusion of independent reliability." Pet. App. 18a. The court relied on Lopez's "*Wade* hearing description of the 'owner' as between 37 and 40 at the time of their summer 1996 encounter," which is consistent with petitioner's "January 2, 1960 date of birth." *Ibid.* Rejecting petitioner's argument that Lopez's description at the hearing was inaccurate, the court explained that the difference "of an inch or two" between

Lopez's description of petitioner's height and his actual height was "not significant, particularly as it could be attributable to the heel height of the leather boots that Lopez testified [petitioner] had been wearing." *Ibid.*

Fourth, the district court found that "Lopez's level of certainty in his identification of [petitioner] also weighs in favor of a conclusion of independent reliability." Pet. App. 19a. The court noted that Lopez had "testified to no uncertainty as to his identification" of petitioner, and that defense counsel had "concede[d] that Lopez appeared certain of [] his identification." *Ibid.*

The only factor found by the district court to weigh against the independent reliability of Lopez's identification was the "time lapse between Lopez's observing [petitioner] and Lopez's selecting his photo from the photo array." Pet. App. 19a. Noting that "similar lapses have not automatically presented insurmountable barriers" to the admission of identification evidence, the court determined that the time lapse was "not dispositive," and that the other factors were "sufficient to counterbalance" it. *Ibid.* (citing cases). The court emphasized that it was ruling only on the admissibility of the identification, not on its weight, and that the lapse of time between Lopez's meetings with petitioner and his photo identification would "presumably be fertile ground for cross examination and argument to the jury." *Id.* at 20a (citing *Brathwaite*, 432 U.S. at 113 n.14).

5. At trial, the photo array and Lopez's identification of petitioner were admitted over petitioner's objection. In addition, Berrios and Feliciano testified that petitioner was involved in Casiano's murder, and Casiano's girlfriend, Maritza Alvarez, testified that petitioner had tried to lure Casiano to Perez Auto on the day of his murder. Pet. C.A. Br. 9; Gov't C.A. Br. 15, 61-62.